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ABSTRACT

The legal status of tenure rights threatened by financial exigency and the role of the American Association of University Professors in protecting those rights are considered. Accommodations of competing managerial, employee, and institutional interests that must be addressed are also discussed. Court cases are reviewed that deal with managerial authority to dismiss tenured faculty. The cases appear to hold that such power is inherent in the authority needed to manage an institution. To identify what constitutes financial exigency, cases and policies are reviewed, and the following issues are raised: what funds are considered and whether the entire institution must be threatened. In considering means of alleviating financial exigency, the following concerns are discussed: whether there is a duty to place the tenured professor in another suitable position, whether non-tenured faculty must be dismissed prior to dismissal of tenured faculty, less drastic means which do not alter faculty rights, and unilateral actions affecting tenure rights. It is concluded that the decisions reviewed indicate that the proper forum for protecting academic freedom in the first instance is academia itself (through express and implied academic contracts), and the judiciary should be a last resort. (SW)

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NEWSLETTER

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FOR THE STUDY OF
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TENURE RIGHTS IN HIGHER EDUCATION IN THE FACE OF FINANCIAL EXIGENCY: THE IMPACT OF PRIVATE AGREEMENT, COLLECTIVE BARGAINING, THE AAUP AND THE COURTS

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Editor's Note: At the Eleventh Annual Conference of the National Center for the Study of Collective Bargaining in Higher Education and the Professions, April, 1983, the issue of "Collective Bargaining in a Period of Retrenchment" was examined. Throughout the conference, a legal theme was prevalent inasmuch as many of the speakers examined their topics from both a case law and statutory framework. The following article by Dena Benson, Esq. continues the examination begun at the conference and provides answers to many of the questions raised. Ms. Benson's article was originally published in the Detroit College of Law Review, Vol. 1983 - Issue 3, Fall.

We believe that the readers of the National Center's Newsletter will find this a most significant article on the subject of Retrenchment and have, therefore, devoted this issue of the Newsletter to a reprint of a major portion of it. Due to space limitations, Section IV, entitled "Substantive and Procedural Protections Inherent in the Good-Faith Dismissal" was excluded. Topics subsumed under this section include: A. "When a Retrenched Professor Can Be Replaced," B. "Faculty Participation in the Retrenchment Decision" and C. "The Nexus Between Faculty Participation in Retrenchment and Collective Bargaining." Readers interested in this section are referred to the Detroit College of Law Review as cited above pp. 695-705.

INTRODUCTION

A concept of academic freedom that teaching and research should be free from political or governmental regulation was brought to the United States from Europe as a custom and practice in higher education that was not to achieve legal recognition until the McCarthy era. No clear definition of academic freedom emerged during that period in which the courts struck down loyalty oaths as instruments of political repression and legislative investigations threatened freedom of expression in academia. A precise definition of academic freedom has yet to be articulated. Nevertheless, there is some authority that the 1940 Statement of Principles on Academic Freedom and Tenure (1940 Statement), promulgated by the American Association of University Professors (AAUP) and the

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Association of American Colleges, is the most widely accepted definition of academic freedom and tenure.⁴ The 1940 Statement describes academic freedom as freedom in research, teaching and learning and describes tenure as a means of securing that freedom, therefore, providing economic security to attract and retain people of ability to the teaching profession.⁵

Typically, once a professor has completed a probationary period, tenure secures for him a limited right to continued employment. Tenured faculty may be dismissed for cause, but there is no uniform definition of what constitutes good cause.⁶ Incompetence,⁷ immorality,⁸ neglect of duty,⁹ and insubordination¹⁰ have been the most prevalent bases for such dismissals. Death or retirement end the tenure contract without reflecting on the ability of the faculty member. Financial exigency as a basis for dismissal of tenured faculty has been recognized since 1925.¹¹ This ground for dismissal is also said not to reflect adversely upon the faculty member's ability, but is a necessary ground for dismissal if academic institutions are to be prudently managed.¹² Economic conditions affecting higher education in the 1970's and 1980's have increased the importance of financial exigency as a ground for dismissal.¹³ Few cases have dealt directly with dismissal for this reason, but the economic climate for higher education through the end of this century may continue to necessitate budget cuts that could substantially increase litigation concerning the scope of tenure rights under circumstances of financial exigency. This Article explores the legal status of tenure rights threatened by financial exigency, the role of the AAUP in protecting those rights, and suggests that certain accommodations of competing managerial, employee, and institutional interests must be addressed if litigation is to be avoided and the concept of tenure is to survive.

I. MANAGERIAL AUTHORITY TO DISMISS TENURED FACULTY

Few cases have dealt directly with the issue of the source of managerial authority to dismiss tenured faculty because of financial exigency. The cases discussed below appear to hold that such power is inherent in the managerial authority needed to operate an institution.

In *Krotkoff v. Goucher College*,¹⁴ the Court of Appeals for the Fourth Circuit looked to college by-laws, the Krotkoff-Goucher contract, and to the general understanding of the college community for indications that managerial authority had been expressly or impliedly limited. Finding no such limitation, the court

concluded that Krotkoff, a tenured professor, was "not exempt...from demonstrably bona fide dismissal if the college confronted financial exigency."¹⁵ Similarly, the Supreme Court of New Hampshire in *Bellak v. Franconia College*,¹⁶ finding no limitation in any document binding the college, held that the board of trustees had "retained" the power to remove a faculty member because of financial exigency.¹⁷

*Levitt v. Board of Trustees of Nebraska State Colleges*¹⁸ may also be read to assume inherent managerial authority. There, the federal district court stated, without explaining, "where lack of funds necessitated releasing a sizeable number of the faculty, certainly it was peculiarly within the province of the school administration to determine which teachers should be released, and which retained."¹⁹

Although the Wisconsin court in *Graney v. Board of Regents*²⁰ used the terms "inherent" and "implied" indiscriminately, the concept it appeared to be explaining more closely resembles inherent authority. The court cited a provision that the board of regents "shall possess all other powers necessary or convenient to accomplish the objects and perform the duties prescribed by law."²¹ Unless the power to dismiss tenured faculty for financial reasons is expressly or impliedly limited, the power exists. Such power must be inherent in managerial authority.

That such power is not absolute was recognized in *Board of Regents v. Roth*,²² wherein the United States Supreme Court noted that the scope of tenure rights is determined by reference to the contract or policy which defines that term at each institution. Whether tenured professors enjoy any insulation from dismissal in times of financial exigency depends upon how that contract is construed. Contractual terms, express and implied, have limited the otherwise unfettered discretion of management to dismiss tenured faculty for financial reasons.

Public institutions may not terminate a contract of continuous employment without affording the faculty member due process of law.²³ Statutes and contracts affecting public sector employment may narrow institutional discretion beyond constitutional limits. Private institutions contractually reserve the power to dismiss tenured faculty for financial exigency but may limit that power to protect tenured faculty from arbitrary dismissal. The Court of Appeals for the First Circuit recently looked to AAUP principles, which had neither been expressly incorporated into the faculty member's contract nor expressly adopted by the

institution, for guidance in the absence of binding precedent in Puerto Rico.²⁴ According to the court, these principles were implied in the contract. The court's decision that the college has the implied power to dismiss a tenured faculty member for financial reasons was significantly balanced by the faculty member's implicated right to "an unavoidable termination."²⁵ The Court of Appeals for the Fourth Circuit has similarly implied that right upon a demonstrably bona fide showing of financial exigency.²⁶

These implied faculty rights are increasingly based on the contractual concept of good faith and fair dealing. When, for example, Howard University purported to follow AA'P principles concerning dates by which faculty were to be notified of contract non-renewal and in the same document disclaimed any contractual obligation to adhere to those dates, the Court of Appeals for the District of Columbia denounced the disclaimer.²⁷ The court suggested that such a disclaimer, if applied to the rights of tenured faculty, would render the contract a "lame instrument for defining the framework of relationships between the University and the victim of its about-face."²⁸ The implied rights may derive from the common understanding of the academic community, not just at a particular college, but at institutions nationally. In *Krotkoff v. Goucher College*,²⁹ and in *Drans v. Providence College*,³⁰ these rights emanated from this common understanding.

II. WHAT CONSTITUTES BONA FIDE FINANCIAL EXIGENCY

A. A Definition

Although it may be clear that a college has the inherent right to retrench tenured faculty in times of financial exigency, what constitutes financial exigency is not clear. A few cases have addressed the issue, but none have provided a definition or formula by which exigency may be measured. Large deficits³¹ and declining enrollments, accompanied by legislative budget cuts,³² have been presumed to establish financial necessity to retrench faculty. In *AAUP v. Bloomfield College*,³³ the New Jersey court paraphrased financial exigency as a "state of urgency."³⁴ Lacking a clear judicial definition, one may conclude that financial exigency is less than a threat of bankruptcy, but more than an inability to meet operating expenses.

B. What Funds Are Considered

The lower court in *Bloomfield College* suggested that one of the college's capital assets might be sold to avoid the necessity of dismissing faculty.³⁵ The appellate court rejected this suggestion, leaving disposition

of capital assets to the policy-making body of the college, and establishing that operating funds, rather than capital assets, should be used to determine whether financial exigency exists.³⁶ The United States Court of Appeals for the Fourth Circuit in *Krotkoff* followed the New Jersey court's suggestion in limiting the exigency to operating funds. In *Krotkoff*, the suggestion that an endowment be dissipated to meet operating expenses was rejected, despite the college's "pressing" financial condition evidenced by its one and a half million dollar deficit and decline in enrollment.³⁷

In *Duggan v. Atlantic Community College*,³⁸ the financial issue concerned proper earmarking of funds for the operating budget. When Professor Duggan at Atlantic Community College in New Jersey perused the college's financial situation, he discovered a fund not reported by the college in its claim of financial exigency. Professor Duggan had been retrenched along with other tenured faculty. The college explained that the sum Duggan found was accumulated state and federal grant money it had not spent. The college was treating the sum as a possible liability. The administrative law judge, in an unreported decision rendered in September 1981, presumed the good faith and diligence of state and federal governments in overseeing their grants and deemed the money part of the operating fund.

The approach that operating funds rather than capital assets be considered in determining the exigency may reflect judicial reluctance to become involved in decisions requiring managerial discretion. Arguably, capital assets which produce income for the operating budget should not be liquidated when the long-term income generated by such an investment would be lost. Immediate funds gained from liquidation could alleviate short-term deficits but result in ultimate bankruptcy of the institution. When an institution has invested its capital, however, in a manner such that it appears to be engaged in more than the business of education by having diversified into other business endeavors, courts may be less reluctant to find bad faith if the institution retrenches tenured faculty because of operating fund deficits without disposing of at least some of its non-educational investments. Until that situation arises, courts can be expected to continue their abstention from this aspect of managerial discretion.

C. Whether the Entire Institution Must Be Threatened

The AAUP's 1976 Recommended Institutional Regulations on Academic Freedom and Tenure, Termination of Appointments because of Financial Exigency (1976 Regulations) provides that termination "may occur under extraordinary

circumstances because of a demonstrably bona fide financial exigency, i.e. an imminent financial crisis which threatens the survival of the institution as a whole and which cannot be alleviated by less drastic means."³⁹ The suggestion that the institution as a whole must be threatened presents a special problem to the university sprawled geographically over several campuses. Arguably, the entire university system would have to be threatened before the 1976 Regulations would permit tenure terminations. The single-campus university would face the problems inherent in having to subsidize one college from the funds gleaned from other colleges. Similarly, one department within a college could drain funds from other departments. To the extent that departments and colleges are budgeted on a regular basis so that some subsidize others because of an academic need to continue a financially dependent department or college, the regulation is not a radical departure from practice during times of financial strength. A different rule, one that would permit retrenchment when only one segment of the institution is impermissibly dependent on the others, could threaten academic freedom. The smaller the area, department or program designated as a financial drain and ripe for retrenchment, the greater the opportunity for abuse of tenure rights because narrowing the area of financial exigency focuses more on persons than on programs.

The Supreme Court of Nebraska, nevertheless, rejected the AAUP's regulation that the exigency affect the institution as a whole in *Scheuer v. Creighton University*.⁴⁰ The court feared that such a requirement would cause financial problems to spread from department to department and from college to college, causing the ultimate demise of the university before tenured faculty could be retrenched. The court recognized the need in higher education, as in the commercial world, to weed out the areas which are losing money rather than subsidizing them with funds from healthier areas. The court construed "financial exigency on the part of the institution," as it appeared in the faculty handbook, as not requiring an institutional threat, especially since the handbook further provided that "termination of appointment(s) ... based upon financial exigency... may be considered to include bona fide discontinuance of a program or department of instruction or the reduction in size thereof...."⁴¹

All of the colleges at Creighton were generally subsidized to the extent of six to seven and a half percent of their budgets. If exigency were not shown in the School of Pharmacy where Scheuer was tenured, retrenchment could not take place. In that event, the subsidy of the School of Pharmacy would double, diminishing funds available to the other colleges. The institution argued,

therefore, that the School of Pharmacy was financially exigent. Under these facts, financial exigency was found to exist; the court stated that exigency may be limited to a department or college, and held it to exist in the College of Pharmacy.⁴²

III. MEANS OF ALLEVIATING FINANCIAL EXIGENCY

Financially exigent institutions have many ways of restoring economic stability. Retrenching tenured faculty is only one avenue for relief. Whether the institution has a legal obligation to tenured faculty to seek means to alleviate the exigency before commencing a reduction in force is explored in the discussion which follows.

A. Whether There Is a Duty to Place the Tenured Professor in Another Suitable Position

At Catholic University of America, Professor Browzin's program of instruction was terminated as part of the university's plan to restore financial integrity. Browzin maintained that the university was obligated to place him in another suitable position because, as the parties stipulated, the following AAUP provision was incorporated into the Browzin-Catholic University contract: "Before terminating an appointment because of the abandonment of a program or department of instruction, the institution will make every effort to place affected faculty members in other suitable positions."⁴³ The Court of Appeals for the District of Columbia avoided a decision on whether this provision applied to financial exigency as well as to the abandonment of a program or department. The court held that, because Browzin's program of instruction was terminated, the university was obligated to attempt to find him another suitable position in the institution. That duty had not been breached, however, because the attempt was made, yet no suitable position was available. The court provided a rationale for applying the provision to financial exigency without so holding:

The obvious danger remains that 'financial exigency' can become too easy an excuse for dismissing a teacher who is merely unpopular or controversial or misunderstood--a way for the university to rid itself of an unwanted teacher but without according him his important procedural rights. The 'suitable position' requirement would stand as a partial check against abuses. An institution truly motivated only by financial considerations would not hesitate to place the

tenured professor in another suitable position if one can be found, even if this means displacing a non-tenured instructor.⁴⁴

Krotkoff v. Goucher College is especially significant because no express contractual provision existed which imposed a duty on the college to find another position for Professor Krotkoff.⁴⁵ The court held that the duty was implied from the contract of employment. Citing the 1940 AAUP Statement, the court recognized that

the academic community commonly understands that inherent in the concept of a 'demonstrably bona fide' termination is the requirement that the college use fair and reasonable standards to determine which tenured faculty members will not be reappointed. The college's obligation to deal fairly with its faculty when selecting those whose appointments will be terminated is an attribute of tenure. Consequently, it is an implicit element of the contract of appointment.⁴⁶

The college did send Professor Krotkoff a list of available positions, but the only area of interest to her would require two to four years of additional training which the college contended, and the court concurred, was not required. The court's holding that the institution is not required to retrain the retrenched faculty member for another position is consistent with the approach taken by the AAUP. According to the 1976 Regulations, the duty to attempt to find another suitable position for the faculty member applies to both discontinuance of programs and departments in the absence of financial exigency, as well as to retrenchment because of financial exigency. The AAUP recommends retraining only in the former situation.

A different approach was taken by an administrative law judge in the public sector case, Duggan v. Atlantic Community College.⁴⁷ The judge reached the conclusion that the college had a duty to attempt to find other suitable positions for the tenured professors who had been retrenched. The legal basis for that conclusion is not altogether clear. The applicable statute requires colleges in New Jersey with declining enrollments to determine which faculty would be retrenched on the basis of length of service.⁴⁸ Those who were retrenched were entitled by statute to be placed on a preferred list should an opening occur. The college apparently did not

voluntarily investigate the qualifications of those faculty it retrenched since the judge had to order the college to do so. It could be said that the right to be considered for alternative positions was implied in the statute.

Another aspect of the case suggests that a theory of estoppel was used. The college's ad hoc faculty committee had recommended a crossover provision which would permit faculty to apply to teach in another subject area, providing flexibility which could save the tenured faculty member's position. The college did not adopt the policy but claimed at trial that it used that provision when it dismissed several tenured faculty. The college claimed that no one applied to crossover and that it was the duty of the union, the New Jersey Education Association, to inform the faculty of its obligation to apply for crossover status. The judge found that the college, not the union, had the duty to inform the faculty of any procedure which it intended to use and ordered reinstatement of the retrenched faculty who could be found to qualify for cross-over.

If the duty to offer other available suitable employment to a tenured professor exists, a definition of "suitable employment" would be helpful. One case which dealt with whether the faculty member has a duty to accept another position at the same institution is somewhat instructive. The Supreme Court of Alaska in University of Alaska v. Chauvin dealt with the issue of mitigation of damages when it said that Chauvin had a duty to accept suitable alternative employment provided it did not involve "embarrassment or hardship."⁴⁹ Because the positions offered Chauvin were non-tenure positions, one of them occupied by him earlier in his career, the court determined that the positions were not suitable. Although Chauvin had no duty to accept an unsuitable position to mitigate damages, whether those positions would similarly be deemed unsuitable for the purpose of offering him an alternative to retrenchment remains open.

B. Whether Non-Tenured Faculty Must Be Dismissed Prior to Dismissal of Tenured Faculty

The AAUP's Regulations suggest that non-tenured faculty be terminated before tenured faculty unless a serious distortion of the academic program would result.⁵⁰ The New Jersey court in AAUP v. Bloomfield College did not deal directly with whether, in the absence of an express duty, the college had an implied duty to first dismiss non-tenured faculty. The fact, however, that the college dismissed thirteen tenured faculty, placed all remaining

faculty on one-year terminal appointments, and within three months, replaced the dismissed faculty with non-tenured professors, was denounced by the court as violating the contractual obligation of the college to assure that dismissals for financial exigency be bona fide:

Although some financial relief might have been realized by discontinuing the services of the 13 faculty members, it has not been suggested how the college could possibly have been similarly benefited by placing the entire remaining faculty, including tenured personnel, on one-year terminal contracts. This startling action could have produced no immediate financial benefit, could not have been inspired by financial exigency, and can only be interpreted as a calculated repudiation of a contractual duty without any semblance of legal justification. It was a gratuitous challenge to the principle of academic tenure. Its clear implication of ulterior design and lack of sensitivity to the question of moral correctness reflect adversely upon the claimed bona fides of discharging the 13 faculty members for the same given reason.⁵¹

It is precisely this issue of good faith that the 1976 Regulations addressed in requiring that non-tenured faculty be the first to be dismissed.

Some institutions have sought to insulate themselves from the AAUP approach by limiting tenure to a discipline, department, program, college or campus so that any rights of a tenured faculty to teach courses of non-tenured members would be similarly limited. This practice is illustrated in Steinmetz v. Board of Trustees,⁵² a case involving retrenchment because of declining enrollment not yet reaching the status of financial exigency. The Illinois court, finding no express statutory or contractual limitation on the Board's right to manage the community college, denied Steinmetz's claim that the Board must dismiss a non-tenured faculty member who taught the same courses before Steinmetz could be dismissed. Read in a light most favorable to Steinmetz, the decision could be said to hinge upon the fact that the non-tenured faculty member taught at a different campus and Steinmetz's tenure was held to be limited to his campus, not the broader multi-campus district.

In Rymer (sic) v. Kendall College,⁵³ the institution protected itself from Rymer's

claim that he was entitled to teach in the night program when his courses in the day program were discontinued. The college showed that the two programs were distinct. The Illinois appellate court affirmed the trial court's narrow construction of Rymer's tenure contract as applying only to the day program and upheld an indefinite leave of absence with pay for one year.

Although the prevailing rule appears to be that management's inherent authority to operate the institution includes retrenchment of tenured faculty necessitated by financial exigency, Bloomfield College illustrates the need to inquire whether financial necessity is a bona fide defense to dismissal of tenured faculty as a first resort or a subrosa abolition of tenure stripped of any colorable claim that the institution acted in good faith. Whether the requisite bona fides, sometimes implied in the tenure contract, will be extended by implication to include a right to have non-tenured faculty dismissed before tenured members remains to be seen.

C. Less Drastic Means Which Do Not Alter Faculty Rights

A number of measures may be taken to avoid or postpone a financial crisis of the magnitude that would require dismissal of faculty. If these measures fail to avert the exigency, the fact that they were implemented may serve a useful purpose in litigating a faculty dismissal. Goucher College employed the following measures prior to its decision that retrenchment would be necessary: adopting a more aggressive investment policy, using capital investments to decrease its exigency, freezing salaries, diminishing administrative and clerical staffs, renting unoccupied dormitory space, and deferring maintenance.⁵⁴ Although the college was under no apparent legal obligation to take these actions prior to retrenchment, the fact that they did so convinced the court that the exigency was bona fide.

D. Unilateral Actions Affecting Tenure Rights

By mutual agreement, colleges and their faculties may seek to avert layoffs and dismissal of tenured members through measures such as reduction in salary, early retirement, increased teaching loads, lengthening of the contract year to include summer programs or adjusting the work day to include teaching in night programs. Other policies, such as the

granting of tenure at the institution as a whole or within a discrete segment of it, or abolishing the tenure system in favor of short-term renewable contracts of three, four, or five years duration, are matters which affect the conditions of employment of all faculty. Changes in policy may be required because of academic reasons as well as to prevent economic disaster. When such changes are indicated, it must be determined whether, and to what extent, a tenured faculty member has a contractual right to the policies operative at the same time he was granted tenure, in effect rendering the changes prospective only. If tenure confers a bare right to continued employment, then management is free to offer continued employment under any circumstances, and free to change policies which affect terms and conditions of employment. The faculty is then free to exercise one of two choices, sign the contract or look for employment elsewhere.

The courts have taken several approaches to this issue. In 1978, an Illinois court of appeals in Rose v. Elmhurst College⁵⁵ indicated in dicta that the right of the college to make policy changes is not absolute:

We would find some difficulty ... in concluding if we were to reach the issue, that 'tenure' simply means the right each year to accept employment on whatever terms the trustees establish from time to time; or to conclude that a tenured professor could be required to give up tenure privileges as a condition for the annual renewal of his contract. At the very least a factual issue would necessarily be present to determine whether there is an unwritten 'common law' comprised of the conduct, customs and usage of the academic community in general or of the (particular college), which would permit unilateral modification by the college trustees of a college's tenure commitment to its faculty member.⁵⁶

In 1981, the Supreme Court of Montana held that rank, salary, and the number of months contracted for are essential components of the tenure contract and not subject to unilateral change⁵⁷ to the detriment of the faculty member. The source of these vested rights was not to be found in an express provision of the contract but was implied from the AAUP's 1940 Statement which provides, in part, that tenure is intended to give "a sufficient degree of economic security to make the profession attractive to men and women of ability."⁵⁸

The court in Russell v. Board of Trustees of University of Arkansas⁵⁹ assumed that plaintiff's right to the retirement age in effect at the time he was granted tenure was a tenure-based contractual right. The court held that the retirement policy could be changed only if due process were afforded the plaintiff. Faculty participation in the decision to lower the retirement age and plaintiff's knowledge of the proposed change in advance of its adoption were held sufficient to satisfy plaintiff's procedural due process rights.

In 1975, the Ohio Supreme Court in Rehor v. Case Western Reserve University⁶⁰ held that the university may change the retirement age after faculty are granted tenure so long as the change is reasonable, uniformly applicable and is supported by adequate consideration. The court found adequate consideration in that Rehor had accepted \$500 annual salary increases for four years after the retirement policy was changed and accepted a clause in his last contract before retirement which declared the appointment to be terminal. Justice Celebrezze dissented on the issue of adequate consideration because he found no evidence indicating plaintiff's raises were accepted in exchange for lowering the retirement age.⁶¹

Drans v. Providence College,⁶² a 1978 decision by the Supreme Court of Rhode Island, held that signing contracts which included salary increases without reference to any change in retirement policy did not constitute acceptance of the changed policy. The court criticized the analysis in Rehor.

If, as the court (in Rehor) said, a university's personnel policies are impliedly incorporated into a professorial contract, then the college's unilateral right to make reasonable alterations thereof must be denied. On the other hand, if the college has the inherent or reserved authority to make changes unilaterally, it is idle to speak of retirement as a contractual term to which pedagogical consent is a sine qua non....We believe the proper balancing of the prerogatives of the university and the rights of individual faculty members should be gleaned from the contract of the parties and from their reasonable expectations regarding university-wide regulations, rules, and policies.⁶³

If, as the Rehor court held, all the rules and regulations of a university were implied in

faculty contracts, effective management of the university would be undermined by the need to gain faculty consent to every change, whether it affected retirement, tenure, or regulations for checking books out of the university library. The Drans court, therefore, relying on references to pertinent AAUP provisions in the Faculty Manual which recognized the need for flexibility in the matter of retirement policy and on the custom and usage of the national academic community's understanding of tenure, decided that "the college had the power and authority, consistent with its outstanding tenurial obligations, to unilaterally institute a reasonable, uniformly (sic) applicable, mandatory retirement policy" where none had existed⁶⁴ prior to plaintiff's achieving tenure.

The United States District Court for the Eastern District of Virginia distinguished Rehor in Taliaferro v. Dykstra.⁶⁵ Longwood College forced plaintiff into retirement prior to the agreed-upon age of seventy which was established when she was tenured. The court held that Longwood College had violated her tenure-based contractual right to continuous employment until age seventy.⁶⁶ The situation in Rehor was distinguished in that Longwood College faculty were not involved in the decision to change the retirement age and had no understanding that the policy could be unilaterally changed.

Denying defendant's motion to dismiss for failure to state a claim, the United States District Court for the Southern District of New York said in Karlen v. New York University⁶⁷ that NYU had probably reserved its authority to change the retirement age so long as the change was reasonable, was done in good faith, and accommodated the economic security expectations of tenured faculty. New York University had made adjustments in the retirement allowance and additional contributions to the pension fund.⁶⁸ The court noted that

(w)e can see nothing in the plaintiff's acceptance of four apparently routine salary increases, or in his receipt, without objection, of four letters notifying him of his continuing employment as a tenured professor (neither of which required the plaintiff to sign any form or acknowledge any agreement), which could constitute an implied waiver.⁶⁹

If, as in Rehor, adequate consideration for retroactive, unilateral changes in contractual rights is found in the mere signing of a contract without remuneration for the waived

right, then arguably tenure can be abrogated at the will of the institution. Hopefully, courts will follow the sounder reasoning of Drans, Taliaferro, Rose, and Karlen, whether addressing the issue of reduced retirement age to avoid financial exigency or the issue of outright abolition of tenure to achieve financial stability.

...

CONCLUSION

Courts recognize that managerial authority is not broad enough to protect arbitrary discharges of tenured faculty. Widespread acceptance of the 1940 AAUP Statement by institutions led to judicial acceptance of the Statement as a common law of the workplace. Precedent is established, therefore, that will permit judicial acceptance of the 1976 Regulations as implied contractual rights. Until uniform regulations of the AAUP for financial exigency are adopted by a substantial number of institutions, however, it is unlikely that all of the provisions of the 1976 Regulations will be implied by the courts into tenure contracts. In the absence of these Regulations, tenure rights in the face of financial exigency will continue to receive uneven treatment in the courts. The academic community must reach common agreement on accommodating faculty interests in preserving academic freedom and tenure and the institution's interest in remaining financially viable.

Outright abrogation of tenure in response to financial exigency would constitute an overreaction of such magnitude that higher education as we have known it would probably never recover. Long-range planning to avoid or mitigate financial exigency leads to reevaluation of existing programs, elimination of some and establishment of new ones in increasingly frantic efforts of some institutions to attract students. The emerging pragmatic approach to curriculum may be diluting the traditional liberal education many institutions have been offering. A spectre of red ink may be leading administrators more expert in financial than in academic matters to seek solutions which skew the continuingly valid tenets of a liberal education in favor of restoring the equilibrium of the balance sheet. To stem a movement to eliminate tenure, the 1976 Regulations must be and are being reappraised.

Rigid regulations should be avoided in favor of flexible considerations which, if adhered to, would support good faith in declaring financial exigency and good faith in choosing which faculty to dismiss. The 1976 Regulations appear to attempt to achieve this goal. Because tenure does protect freedom of expression, perhaps courts should use the test enunciated by the United States Supreme Court in Mt. Healthy Board of Education v. Doyle⁷⁰ to protect a public school teacher's freedom from dismissal because of an unpopular exercise of free speech. There, the court held that, after the teacher shows a prima facie case that dismissal was based upon an exercise of free speech, the burden of persuasion shifted to the institution to show that the teacher would have been dismissed absent the protected activity. The institution must show a good reason for the dismissal which would have sustained it absent the prohibited reason. If the courts were to require that an institution show a good-faith financial exigency and good faith in choosing whom to dismiss guided by considerations based on the 1976 Regulations, then financial exigency as a defense to a charge of tenure

violations would accommodate the competing interests at stake.

The decisions reviewed in this Article indicate that the courts are looking to academic contracts, express and implied, for guidance. Such judicial deference, if it be that, to academia's guidelines for safeguarding tenure, poses a threat and a challenge. The judicial threat to tenure is that only minimal safeguards will continue to be enforced contractually until institutions adopt greater safeguards. The challenge lies in the readiness of the courts to enforce greater safeguards contained in tenure contracts and a proven readiness to adopt a common law of higher education implied from the expectations of the academic community. That community, by coming to grips with the 1976 Regulations, or some variation thereof, and adopting them on a widespread basis, can achieve greater protections for higher education than now exist. This review of recent decisions clearly indicates that the proper forum for protecting academic freedom in the first instance is academia itself, and only as a last resort, the judiciary.

FOOTNOTES

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1. See generally Ringer, The Decline of the German Madarins (Cambridge: Harv. Univ. Press 1955).

2. Edwards and Nordin, Higher Education and the Law (Cambridge: Institute for Educational Management 1979).

3. Van Alstyne, "The Specific Theory of Academic Freedom and the General Issue of Civil Liberties," 140 Annals of The American Academy 404 (1973).

4. Edwards and Nordin, supra note 2, at 218.

5. 60 AAUP Bull. 269 (1974).

6. B. N. Shaw, Academic Tenure in Higher Education 62-66 (1971).

7. Chung v. Park, 514 F.2d 382 (3rd. Cir. 1975).

8. Koch v. Board of Trustees of University of Illinois, 39 Ill. App. 2d 51, 187 N.E.2d 340 (1963), cert. denied, 375 U.S. 989 (1964).

9. Shaw v. Board of Trustees of Frederick Community College, 549 F.2d 929 (4th Cir. 1976).

10. State ex rel. Richardson v. Board of Regents of University of Nevada, 70 Nev. 347, 269 P.2d 265 (1954).

11. 1925 Conference Statement of AAUP.

12. M. Finken, "Regulation by Agreement: The Case of Private Higher Education", 65 Iowa L. Rev. 1119 (1980).

13. Id.

14. 585 F.2d 675 (4th Cir. 1978).

15. Id. at 680.

16. 118 N.H. 313, 386 A.2d 1266 (1978).

17. Id. at 317, 386 A.2d at 1269.

18. 376 F. Supp. 945 (D. Neb. 1974).

19. Id. at 950.

20. 92 Wis. 2d 745, 286 N.W.2d 138 (1979).

21. Id. at 758, 286 N.W.2d at 145.

22. 408 U.S. 564 (1972).

23. Perry v. Sinderman, 408 U.S. 593 (1972).

24. *Jiminez v. Almodovar*, 650 F.2d 363 (1st Cir. 1981).
25. *Id.* at 368.
26. *Krotkoff v. Goucher College*, 585 F.2d 675 (4th Cir. 1978).
27. *Greene v. Howard University*, 412 F.2d 1128 (D.C. Cir. 1969).
28. *Id.* at 1134-35, n.9. See *Sarle v. School Dist. No. 27 of Pima County*, 32 Ariz. 96, 255 P. 994 (1927) (contract provision allowing termination on 30 days notice violated the state tenure act).
29. 585 F.2d 675 (4th Cir. 1978).
30. 119 R.I. 845, 383 A.2d 1033 (1978).
31. *Bellak v. Franconia College*, 118 N.H. 313, 386 A.2d 1266 (1978).
32. *Graney v. Board of Regents*, 92 Wis. 2d 745, 286 N.W.2d 138 (1979); *Levitt v. Board of Trustees*, 376 F. Supp. 945 (D. Neb. 1974).
33. 136 N.J. Super. 442, 346 A.2d 615 (1975).
34. *Id.* at 446, 346 A.2d at 617.
35. 129 N.J. Super. 249, 322 A.2d 846 (1974).
36. 136 N.J. Super. at 446-47, 346 A.2d at 617.
37. 585 F.2d at 681.
38. No. 4971-80 (N.J. Office of Admin. Law Sept. 28, 1981).
39. 1976 RIR Sec. 4(c) (1).
40. 199 Neb. 618, 260 N.W.2d 595 (1977).
41. *Id.* at 622, 260 N.W.2d at 597.
42. *Id.* at 631-32, 260 N.W.2d at 601.
43. *Browzin v. Catholic University of America*, 527 F.2d 843 (D.C. Cir. 1975).
44. *Id.* at 847.
45. 585 F.2d at 682.
46. *Id.*
47. No. 4971-80 (N.J. Office of Admin. Law Sept. 28, 1981).
48. N.J. Stat. Ann. Sec. 18A:60-3 (1946) (amended 1962).
49. 521 P.2d 1234, 1240 (Alaska 1974).
50. 1976 RIR Sec. 4(c) (3).
51. 129 N.J. Super. at 268, 322 A.2d at 856.
52. 24 Ill. 604, 385 N.E.2d 745 (1979). See also *University of Washington v. Harris*, 24 Wash. App. 228, 600 P.2d 653 (1979) (university was not required to eliminate an unfilled position which was funded in order to pay the salary of a professional employee laid-off for lack of funds).
53. 64 Ill. App. 3d 355, 380 N.E.2d 1089 (1978).
54. *Krotkoff v. Goucher College*, 585 F.2d 675, 677.
55. 62 Ill. App. 3d 824, 379 N.E.2d 791 (1978).
56. *Id.* at 827 n.2, 379 N.E.2d 794 n.2.
57. *Keiser v. State Bd. of Regents of Higher Educ.*, 630 P.2d 194 (Mont. S. Ct. 1981), reh'g denied.
58. *Id.* 630 P.2d at 199.
59. 502 F. Supp. 916 (E.D. Ark. 1980), aff'd, 657 F.2d 1068 (7th Cir. 1980).
60. 43 Ohio St. 2d 224, 331 N.E.2d 416, cert. denied, 423 U.S. 1018 (1975).
61. *Id.* at 234, 331 N.E.2d at 423.
62. 119 R.I. at 852-53, 383 A.2d at 1033.
63. *Id.* at 856-57, 383 A.2d at 1039-40.
64. *Id.* at 858, 383 A.2d at 1039-40 (remanded for a determination of whether the change in policy was valid as applied to plaintiff, 410 A.2d 992 (1980)).
65. 434 F. Supp. 705 (E.D. Va. 1977), vacated on other grounds *sub nom.*, *Taliaferro v. Willet*, 588 F.2d 428 (4th Cir. 1978).
66. 434 F. Supp. at 711.
67. 464 F. Supp. 704 (S.D.N.Y. 1979).
68. *Id.* at 706.
69. *Id.* at 708.
70. 429 U.S. 274 (1977).

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